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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1947

No. 310

J. H. BELL,
Petitioner,

vs.

HUBERT B. SCUDDER, as Real Estate Commissioner of the State of California,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the District Court of Appeal of the State of California, Third Appellate District and BRIEF IN SUPPORT THEREOF.

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to the District Court of Appeal of the State of California, Third Appellate District.

To the Honorable Fred W. Vinson, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decision (Rec. 137) of the District Court of Appeal of the State of California in the case entitled *"J. H. Bell, Petitioner and Appellant vs. Hubert B. Scudder, as Real Estate Commissioner of the State of California, Respondent."*

In this cause, your petitioner sought a writ of mandate to compel the issuance to him of an annual license under the terms of the California statute regulating the business of real estate brokers.

Stats. (Cal.) 1937, p. 2124.

That statute contains a provision that the license issued to a real estate broker may be suspended for fraud or dishonest dealing. In this instance, the Real Estate Commissioner adopted the somewhat novel procedure of providing for the issuance to the petitioner of his annual license, but postponing the effective date for a period of sixty days. In essence, the petitioner was deprived of the right lawfully to do business for this period of sixty days.

The ground of the order of the Real Estate Commissioner was that the petitioner had been guilty of dishonest conduct in a certain transaction by which the petitioner acquired title to a parcel of realty from persons referred to in the record as "the Kings", disposing of it, at a profit, to persons referred to in the record as "The Fritcheys".

The transcript of the hearing before the Real Estate Commissioner of the State of California was introduced in evidence on the trial of the petition for writ of mandate and constitutes the bulk of the present record.

THE OPINION UNDER REVIEW.

The decision of the District Court of Appeal affirms the order of the Trial Court in denial of the petition for writ of mandate. This is done solely upon the

ground that a certain letter written by the Kings, the owners, to the effect that they would take $8500 "net to us" was a renewal of a pre-existing agency in favor of the petitioner to sell their property.

The District Court of Appeal recognizes that the previous listing of the property had been cancelled by a letter from the Kings to petitioner. The decision is based solely upon the theory that the contract naming a price which the owners would take "net to us" was a recognition and renewal of the agency. This theory is wholly without merit. With unanimity, the cases hold that such an arrangement does not establish an agency.

JURISDICTION.

The jurisdiction of this Court is invoked under that section of the Judicial Code,

28 *U.S.C.A.* 344, Par. (b),

which reads, in part, as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution * * *."

The Supreme Court, the court of highest resort in California, denied a hearing of this case. (Rec. p. 145).

THE FEDERAL QUESTION.

Your petitioner asserts that he has been deprived of property without due process of law. As is recognized in the opinion of the District Court of Appeal, your petitioner has been engaged in business as a real estate broker for a period of twenty-five years. As will be demonstrated by the accompanying brief, his right to engage in such business is a vested property right protected by the provisions of the Fourteenth Amendment to the Constitution of the United States.

The grounds upon which the District Court of Appeal has affirmed the deprivation of license for this period of time are so definitely at variance from established law, and are so unsubstantial as to amount to the taking of petitioner's property without due process of law.

THE TIME AND MANNER OF RAISING THE FEDERAL QUESTION.

The federal question was raised in the petitioner's opening brief, as an appellant before the District Court of Appeal. (Rec. p. 146). It was again raised in the petittion for hearing before the Supreme Court of California. (Rec. p. 147).

Wherefore, petitioner prays that a writ of certiorari be issued out of this Court, directed to the District Court of Appeal of the State of California, Third Appellate District, for a review of said cause.

Dated, San Francisco, California,
August 26, 1947.

STERLING CARR,
Counsel for Petitioner.

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No.

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vs.

HUBERT B. SCUDDER, as Real Estate Commissioner of the State of California,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The right of the petitioner to engage in business as a real estate broker is a property right which is entitled to protection under the Fourteenth Amendment.

Laisne v. California State Board of Optometry (1942), 19 Cal. (2d) 831, 835.

The attempt here is to deprive the petitioner of the right to engage in business based upon alleged dishonesty in a transaction wholly unrelated to his activ-

ity as a real estate broker. If the statute is thus applied, the effect is to render it unconstitutional in this one connection.

Moreover, the petitioner's conduct could not possibly be deemed dishonest when its legality is affirmed by all of the authorities on the subject.

The controlling doctrine precluding the existence of an agency here is well expressed in

Patterson v. Torrey, 18 Cal. App. 346

where the Court ruled (bottom of p. 348):

> "The naked act of an owner of real estate in fixing a price at which he is willing to sell or exchange the same, given in writing at the request of a broker, does not constitute an employment of such broker by the owner, or bind him to pay the broker a commission for making a sale of the property."

The telegram coming to the attention of the petitioner, in which the Kings offered to take $8,500.00 for the property, amounted to no more than this.

4 *Ruling Case Law* 248, Note 4:

> "The mere asking and receiving the price of property, however, is not of itself sufficient to establish the employment of a broker * * *"

In accord:

Hicks v. Wilson, 197 Cal. 269, 273 (top).

In

Keck v. Wingert, 132 Cal. App. 475,

an option to lease was executed, but it was nevertheless contended that the optionee was acting as a broker. The upper Court said (at p. 485):

> "There is no ambiguity in the option last referred to, or in any of them, and no room for interpretation of terms or meaning; and we know of no principle that permits one who has executed a document which is clear on its face, with a knowledge of what it means, to set it at naught on such evidence as appears in the record in this case."

The rule is generally recognized that where a broker is to procure a price which is net to the seller, *he may deal with the property individually and buy on his own account.*

A leading case upon this subject is

Hutton v. Sherrard (Mich. 1914), 150 N. W. 135, L.R.A. 1915 E, 976

where the Court ruled that under a "net" arrangement of this character the broker was free to buy on his own account, since all the principal exacted was a certain minimum sum.

The decision cites and relies upon

Lynnott v. Shaughnessy (Idaho, 1885), 7 Pac. 82

where a similar holding was made.

In the

Annotation in L.R.A. 1915 E, 976,

the above two cases are reviewed with the comment (p. 977, middle of column 1) that they "would seem to be based on sound principle, as in such a case there is no conflict between the broker's own interests and his duty to the owner."

We, therefore, state that even if Bell's authority had not been cancelled, he would have been free to

acquire the property on his own account under the form of contract here present.

In the Annotation just referred to, the author reviews at length

Robinson v. Easton, Eldridge & Co., 93 Cal. 80, which bears considerable similarity to the problem at hand. There a brokerage concern was authorized to sell land "for the sum of $10,000.—net dollars" with their commission all over said sum. The controversy arose when the title company refused to insure the title and the agents returned the deposit to the prospective purchaser. The plaintiffs, the owners of the property, sued the brokerage concern for the amount of the deposit. In holding that the defendants were not liable, the Court treated the relationship created by the net contract as follows (middle of p. 82):

> "The relation thus created between them was rather that of a vendor and purchaser under a contract of sale than one of principal and agent, and a sale by the defendant thereunder was in the capacity of a vendor upon its own account, and not for the account of the plaintiffs."

That this California case is closely in line with the preceding authorities referred to is demonstrated by the treatment of the case in the annotation to which we have referred.

The following is an additional authority holding that where the authorization to sell is "net" to the buyer, the real estate broker may himself buy.

Slusher v. Moore, (Ken. 1924), 258 S.W. 946, 948, (bottom of column 1);

In

Taylor v. Ward, (Mich. 1933), 249 N.W. 473

and in

Winkler v. Meyering Land Co., (Mich. 1934), 254 N. W. 226,

it was held that where an owner provides for the receipt by him of a net sum, the broker need not disclose a purchase by himself, nor is he obligated for the profit made through such purchase.

In speaking of the general rule that a broker may not purchase for his own account without informing his principal (to which there is an exception in the instance of a "net" contract), this apt comment appears in

12 *C.J.S.* 105 (Column 1):

> "In all these cases the agency of the broker must be proved in order to invalidate the transaction and render him liable to account, and after the termination of his agency he may, the same as any other person, deal in the property of his principal * * *"

That the petitioner derived a profit through buying the property and re-selling, is not a controlling fact. If there is, in this case, no breach of fiduciary duty and no involvement by reason of a previous relationship of client and broker, the petitioner was as free to buy from the Kings as from anyone else.

Plainly, Mr. and Mrs. King knew that they were dealing with Mr. Bell at arm's length. They knew that long prior to this transaction they had expressly terminated his employment. They knew from the

very use of the word "option" that they were conferring upon Mr. Bell a right of ownership in the property, individually in himself. They knew that Mr. Bell was about to re-sell the property, for they admit that he informed them that he had a buyer.

The Kings were content to deal with Mr. Bell on a basis they would have utilized in dealing with any buyer. Naming the selling price of $8,500.00 "net", they realized that, in receiving such sum, the petitioner would have to look elsewhere for a commission or profit or any other form of compensation for service. The Kings were not even interested enough to inquire what the price was which the purchaser was paying for the property. How can it be claimed that they were technically defrauded when there was no representation whatever to them of the purchase price to be paid by the buyer from Bell?

With respect to the Fritcheys, they were aware that Bell had at a prior time possessed relationship to the other side of the contemplated sale, to the extent of formerly carrying a listing of the property. They (the Fritcheys) made an offer in a certain amount, which comprehended no commission. No commitment was made by them for the engagement of the petitioner's services. It will hereinafter be shown that whatever transpired between the petitioner and the Fritcheys fell far short of the establishment of a broker and client relationship.

Nor can it in anywise be said that the petitioner gained any advantage over the Kings by reason of his

former agency, which enabled him to obtain a profit at their expense.

The letter of April 14th, in which the price was reduced, was addressed to Mrs. Prinz. There is no proof whatsoever that it came to the attention of the petitioner, nor is there any fact or circumstance by which his knowledge may be inferred.

It is true that the activities of Mrs. Prinz might be frowned upon in seeking to obtain the property if, ultimately, she had accomplished the purchase without informing the Kings that she was personally acquiring the property. However, that purchase was not made—and this petitioner did inform the Kings, through the very use of the instrumentality of option in his own name, that he was acquiring the property, and expressly informed them that he "had a buyer".

So far as the activities of Mrs. Prinz are concerned, it is to be borne in mind that there is no principle, in this punitive proceeding, by which the knowledge of the subordinate may be attributed to the principal. *Business and Professions Code,* Section 10179.

Finally and conclusively, it is to be borne in mind that the letter to Mrs. Prinz, stating a reduction in price, was written two months after the agency had been terminated. The communication, therefore, amounts only to this: An owner, having ended an agency, announces to the former agent a reduced price which he will take "net" to himself. As presently seen, upon the basis of authority, a mere announcement, to one who is engaged in the real estate

brokerage business, by an owner of property of the amount he will take for a conveyance, does not amount to an employment of the broker. Surely, if this communication did not amount to an employment and if (as is conceded) the original employment had been cancelled, we fail to see any significance in the letter, even if we disregard the fact that it was never brought to the attention of the petitioner.

Moreover, the letter appears to have been entirely unsolicited by Mrs. Prinz, and amounts to nothing other than a voluntary naming of a purchase price by one who is anxious to sell at a stipulated "net" figure.

Does not the use of the very word "net" (embodied in this letter and in the subsequent telegram, which was Mr. Bell's first information as to the selling price), itself invite the recipient to make such arrangements as may be chosen for the compensation for services in effecting the deal? The law answers this question in the affirmative according to the authorities heretofore cited.

The position here adopted by the Real Estate Commissioner amounts to this: No person in the real estate brokerage business is permitted to have any dealing with property formerly listed with him, even though the owner knows that the broker is no longer acting as an agent, and even though the owner is expressly informed that the broker is buying on his own account, and is selling to another.

There is nothing in the law which prevents a broker from buying on his own account, provided his prin-

cipal is so informed. *A fortiori,* when the relationship of agency has ceased, there can be nothing which can be regarded as dishonest conduct from the mere circumstance that a profit on a re-sale has been obtained by way of compensation for services in bringing about the disposition of property.

Commissions are not regulated except through voluntary agreement. If the seller had signed a contract obligating the payment of a twenty-five per cent commission, or any other large proportion of the purchase price, such contract would have been valid. What difference appears, when the parties plainly contemplated that the intermediary would obtain compensation for his services through profit on a re-sale, and that the sellers would receive the stipulated "net" selling price?

It is therefore urged that the writ of certiorari prayed for in the petition be granted.

Dated, San Francisco, California,
August 26, 1947.

Respectfully submitted,
STERLING CARR,
Counsel for Petitioner.